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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 716

UNIVERSAL INSURANCE COMPANY
(a corporation),
Petitioner,

vs.

HALL-SCOTT MOTOR CAR COMPANY
(a corporation),
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT OF FACTS.

No question is presented by the petition for writ of certiorari justifying the granting of such petition.

POINT 1.

The decision in this case is not in conflict with local decisions inasmuch as it is governed by admiralty law and no question of local law is involved.

POINT 2.

The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings.

POINT 3.

The decision in this case is not in conflict with the decisions of this Honorable Court or those of any Circuit Court of Appeals on the same matter.

POINT 4.

No other reasons for granting the petition are stated by petitioner and none in fact exists.

RESPONDENT'S SUMMARY OF MATTER INVOLVED.

This case involves the validity of a maritime contract by which respondent engine manufacturer freed itself from liability for damage negligently done to a boat while in its possession for the purpose of installing an engine therein.

Petitioner's description of respondent as a shipyard "bailee for hire" (Pet. 2, 16, 17) and "a bailee for hire" (Pet. 13) is misleading. If by this description petitioner intends to convey the idea that respondent was acting as a public depositary for safekeeping or a public warehouseman for hire, then the term is incorrect. No such status existed. The Circuit Court of Appeals held (R. 199-200, 201) "Here the parties were free to contract in any manner they chose. The motor car company was in no sense a public utility or charged with a public duty. The ship-

owner was at liberty to select any vendor of engines to replace the old engine and to employ the seller or anyone else to install it'' (R. 200).

''* * * We can see nothing in the relations between the parties which would prevent them from negotiating a contract at arm's length and consequently nothing which would prevent them from exculpating the motor car company for injuries to the vessel resulting from its negligence while in its possession'' (R. 201).

The relationship between petitioner and respondent arose when Hofmann, the purchaser of the boat ''Pacifica'', contacted respondent to purchase a reconditioned Invader engine for installation in the ''Pacifica'' (R. 64). Respondent's printed form conditional sales agreement, dated January 4, 1940, was executed by Hofmann and respondent wherein the Invader engine was sold on time to Hofmann. By added typed clauses it was agreed that respondent would remove the old engine and install the Invader engine in the ''Pacifica'' (R. 55) and further that:

> ''It is understood further Hall-Scott will not be held responsible for any damage to cruiser 'Pacifica' or for anything taken from the same while this engine installation is being made'' (R. 17-18).

Hofmann testified that the ''Pacifica'' was delivered to respondent under the terms and provisions of that conditional sales agreement (R. 78-79) and petitioner admits as much (Pet. 13).

Possession of the boat by respondent was purely a matter of convenience. Such possession was not required by the contract with Hofmann. The engine installation

could just as conveniently have been made at premises not operated by respondent provided suitable equipment was available. The delivery of the vessel to respondent was not for storage or for safekeeping but was entirely incidental to the sale and installation of the Invader engine.

Hence it is clear that (1) there was no bailment for hire in the sense of a bailment or deposit for safekeeping; (2) the possession by respondent was entirely incidental to the contract for sale of the engine; (3) the parties dealt at arm's length; (4) the agreement concerned only their private affairs; and (5) the respondent was not charged with a public duty.

QUESTION PRESENTED.

The Circuit Court of Appeals correctly stated the question as follows:

> "Can the parties to a maritime contract to repair a vessel validly stipulate that the repairer may be freed from the consequences of his negligent damage to the vessel in his custody for repairs?" (R. 190)

and answered it in the affirmative (R. 201).

ARGUMENT.

This petition for certiorari is merely an attempt by the losing party to obtain an additional hearing. There is neither rule nor reason for granting the petition.

POINT 1.

The decision in this case is not in conflict with local decisions inasmuch as no question of local law is involved. The contract in question is of a maritime character and is therefore governed by federal admiralty law to the exclusion of local or state law (*Carlisle Packing Co. v. Sandanger*, 259 U. S. 255, 259). This is conceded by petitioner (Pet. 18) and is so declared by the Circuit Court of Appeals, even though the action was filed on the law side of the Court (R. 189).

POINT 2.

The record clearly establishes that the Circuit Court of Appeals did not depart from the accepted and usual course of judicial proceedings. In its brief (Pet. 30-32) petitioner charges the Circuit Court of Appeals with "prejudice against the petitioner insurance company". The decision was rendered unanimously by the three Judges the Court holding:

> "However, we do not base our decision upon the fact that there was fire insurance in the case at bar" (R. 202).

POINT 3.

The decision in this case is not in conflict with the decisions of this Honorable Court or that of any Circuit Court of Appeals on the same matter. There are neither Supreme Court of the United States cases nor Circuit Court

of Appeals cases which are opposed to the decision in this matter. This decision accepts and follows the only Circuit Court of Appeals decisions on the point.

Newport News Shipbuilding & Drydock Co. v. United States, 34 Fed. (2d) 100 (C. C. A. 4, 1929). Admiralty case. The Court considered the effect of an agreement on the part of the United States to maintain insurance contained in a contract for the repair of one of its vessels. The majority of the Court held that under the agreement the shipyard was exempted from the loss due to its negligence in causing fire while the ship was undergoing repair to the extent of the agreement of the government to maintain fire insurance. Judge Parker dissented but *all agreed that a contract could be made relieving the shipyard from liability for its negligence.** Judge Parker in dissenting said "While of course it is permissible to contract against liability for negligence, no contract ought to be construed to have that effect unless the intention clearly appears." Citing, *McCormick v. Shippy*, 124 Fed. 48, 51 (C. C. A. 2, 1903); *International Mercantile Marine S.S. Co. v. W. & A. Fletcher Co.*, 296 Fed. 855 (C. C. A. 2, 1924). The majority said: "We agree with the Judge below when he said 'there can be no doubt, I think, that *a contract whereby the United States agreed to assume all liability for damage to this vessel while at the yard would be valid.*'" Citing, *Santa Fe etc. Ry. Co. v. Grant Bros. Construction Co.*, 228 U. S. 177.

See also, *International Mercantile Marine S.S. Co. v. W. & A. Fletcher Co.*, 296 Fed. 855 at 860 (C. C. A. 2, 1924), certiorari denied, 264 U. S. 598, 68 L. ed. 868.

*Italics supplied unless otherwise noted.

ANALOGOUS CASES.

Supreme Court of the United States:

Santa Fe, etc. Ry. Co. v. Grant Bros. Construction Co., 228 U. S. 177, 57 L. ed. 787, a leading civil case which holds that a common carrier, when contracting in the capacity of a private carrier, may exonerate itself from liability for damage to property bailed to it for transportation caused by negligence of its own employees.

Wells Fargo & Co. v. Taylor, 254 U. S. 175, 65 L. ed. 205. Civil case. A contract by an employee of an express company whereby he assumed all risks and assented to a contract between a railroad and express company freeing the railway company from liability for negligence to employees of the express company is valid because the railroad was not contracting as a "public service" company.

Robinson v. Baltimore, etc. Co., 237 U. S. 84, 59 L. ed. 849. Civil case. The same rule as the preceding case applied to employees of the Pullman Company.

B. & O. etc. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560, Civil case. A factual situation similar to the preceding case.

Southern Railway Co. v. Prescott, 240 U. S. 632, 60 L. ed. 836. Civil case. A lease clause exonerating the railroad company from liability for negligence is valid.

Hartford, etc. Co. v. Chicago, etc. Co., 175 U. S. 91, 44 L. ed. 84. Civil case. A lease clause, same ruling as preceding case.

Luckenbach v. W. J. McCahan, etc. Co., 248 U. S. 139, 63 L. ed. 170. Admiralty case. "Benefit of insurance" clauses are valid.

Circuit Court of Appeals, Second Circuit:

McCormick v. Shippy, 124 Fed. 48 (C. C. A. 2, 1903), an admiralty case quoted with approval in the *Santa Fe Railway Co.* case, supra, which holds valid a clause in a bareboat charter of a yacht exonerating the charterer as bailee from liability for loss or damage to the yacht.

The G. R. Crowe, 287 Fed. 426 (Dist. Ct., Southern District New York, 1922). Admiralty. Contract for private charter of a vessel. Clause exonerating owner as bailee for transportation from liability for negligence held valid.

Berwind White Coal Mining Co. v. United States, 15 Fed. (2d) 366 (C. C. A. 2, 1926), a civil case. A clause in a bareboat charter providing "the owner assumes the marine and all other risks (including risks usually covered by protection and indemnity insurance)" held valid and excused the bailee from liability for damage caused by its negligence.

The Elizabeth Edwards, 27 Fed. (2d) 747, 1928 A. M. C. 1281 (C. C. A. 2, 1928). Admiralty case. A private water carrier contracted with cargo bailed to it for transportation to be free from liability for its own negligence. Clause held valid.

The Westmoreland, 86 Fed. (2d) 96, 1936 A. M. C. 1680 (C. C. A. 2, 1936). Admiralty case. A clause in a contract by a private carrier imposing on charterer the risk of damage by stowage on ship's skin to goods bailed to the vessel for transportation, held valid.

Circuit Court of Appeals, Fourth Circuit:

Standard Oil Co. v. United States, 264 Fed. 66 (C. C. A. 4, 1920). Admiralty case. A contract between Raymond Concrete Pile Co. as contractor and Standard Oil Co. whereby the latter assumed all risk of liability for damage done by the contracting company to person or property of third persons was held valid.

Cacey v. Virginian Railway Co., 85 Fed. (2d) 976 (C. C. A. 4, 1936) (cert. denied, 300 U. S. 657). Civil case, decided that a railway while contracting as a private carrier may exempt itself by contract from liability for damage caused by its negligence to goods bailed to it for transportation.

Circuit Court of Appeals, Seventh Circuit:

Chicago M. & St. P. R. Co. v. Wallace, 66 Fed. 506 (C. C. A. 7, 1895). Clause in a contract of a railroad company contracting as a private carrier and bailee for transportation exonerating it from liability for damage to property caused by negligence of its employees held valid.

World's Columbian Exposition Co. v. Republic of France, 96 Fed. 687 (C. C. A. 7, 1899). Civil case holding a contract of an exposition company exonerating itself from liability for negligent damage done to property in its possession is valid. Bailment for benefit of both parties.

Circuit Court of Appeals, Ninth Circuit:

Ringling Bros. etc. Shows, Inc. v. Olvera, 119 Fed. (2d) 584 (C. C. A. 9, 1941). Civil case. It was held that the

parties to a contract could exculpate one of them from liability for personal injuries resulting from the effect of his negligence for which he would be liable under the common law.

Contract Made at Arm's Length.

There was no duty of public service involved. The parties dealt at arm's length and the shipowner was at liberty to select any vendor of engines to replace the old engine and to employ the seller or anyone else to install it (R. 200-201). This Court, in the case of *Sun Oil Co. v. Dalzell Towing Co.*, 287 U. S. 291, 77 L. ed. 311, an admiralty case (77 L. ed. 311, 313), held:

> "* * * Respondent had no exclusive privilege or monopoly in respect of the services that petitioner desired to have performed for its tanker. And petitioner was under no compulsion to accept the terms of respondent's pilotage clause. There is nothing to suggest that the parties were not on equal footing or that they did not deal at arm's length. 'There is no rule of public policy which denies effect to their expressed intention, but on the contrary as the matter lies within the range of permissible agreement, the highest public policy is found in the enforcement of the contract which was actually made.' Santa Fe, P. & P. R. Co. v. Grant Bros. Construction Co., 228 U. S. 177, 188, 57 L. ed. 787, 793, 33 S. Ct. 474."

Towage Cases.

The towage cases are *sui generis*. Furthermore, the towage cases are distinguishable inasmuch as they are not bailment cases. Thus, in *Sun Oil Co. v. Dalzell Towing*

Co., 287 U. S. 291, 77 L. ed. 311, at 313, it was held in part:

> "* * * Towage does not involve bailment. * * * Stevens v. The White City, 285 U. S. 195, 200, 76 L. ed. 699, 702, 52 S. Ct. 347; * * *."

A decision in the tug and tow situation is therefore not relevant in our situation because the tug and tow situation is a peculiar type of relationship substantially different from our situation or from any other similar type situation. The tug and tow cases are the only exception with which we are familiar to the general rule which permits parties not engaged in public service to contract against liability for negligence and even this exception is qualified by permitting the tug to contract that the tug master shall be considered an employee of the tow, thereby freeing the tug from liability for the master's negligence. *Sun Oil Co. v. Dalzell Towing Co.*, 287 U. S. 291, 77 L. ed. 311.

The admiralty rule is now well settled and generally accepted that parties contracting in a private capacity such as private carriers and ship repair yard cases, may exonerate themselves from liability for damage done to property in their possession by reason of negligence of their employees. There is neither rule nor reason justifying this Court in upsetting these lines of cases and on the contrary, the line of cases which is confined to non-bailment towage cases is dissimilar in principle and fact and should not be controlling in this situation.

The granting of this petition for certiorari will tend to create confusion. A denial of the petition for writ of

certiorari will perpetuate the universally accepted and harmonious lines of cases on the question involved.

CONCLUSION.

It is respectfully requested that this Honorable Court deny the petition for writ of certiorari.

Dated, San Francisco, California,
November 14, 1941.

Respectfully submitted,

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CLARENCE G. MORSE,
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